

**DISTRICT OFFICE:**        **Huntington District**  
**FILE NUMBER:**        **200401155**

**PROJECT LOCATION INFORMATION:**

State: WV  
County: Webster  
Center coordinates of site (latitude/longitude): 38 29' 05"/80 37' 59"  
Approximate size of area (parcel) reviewed, including uplands: acres.  
Name of nearest waterway: Skyles Creek  
Name of watershed: Skyles Creek and Birch River

**JURISDICTIONAL DETERMINATION**

**Completed:** Desktop determination    ☒    Date: September 13, 2004  
Site visit(s)                                    ☐    Date(s):

**Jurisdictional Determination (JD):**

☐ Preliminary JD - Based on available information, ☐ *there appear to be* (or) ☐ *there appear to be no* "waters of the United States" and/or "navigable waters of the United States" on the project site. A preliminary JD is not appealable (Reference 33 CFR part 331).

☒ Approved JD – An approved JD is an appealable action (Reference 33 CFR part 331).  
Check all that apply:

☐ *There are* "navigable waters of the United States" (as defined by 33 CFR part 329 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: \_\_\_\_\_.

☒ *There are* "waters of the United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: approximately 3,188 linear feet intermittent streams and 523 linear feet of ephemeral streams exist within the proposed project area. The table below details the extent of jurisdictional waters of the U.S. present within the proposed project area.

TABLE A				
Mining Activity	Linear Feet	Acres	Stream Classification	Stream
<b>Permanent Impacts</b>				
Valley Fill No. 1	1250	0.163	Intermittent	Skyles Creek of Birch River
	35	0.000	Ephemeral	
Valley Fill No. 2	520	0.050	Intermittent	Un-named Tributary of Skyles Creek of Birch River
Valley Fill No. 3	832	0.118	Intermittent	Un-named Tributary of Birch River
	351	0.032	Ephemeral	
Valley Fill No. 3	142	0.011	Intermittent	1st Right Un-named Tributary of Un-named Tributary of Birch River
	137	0.007	Ephemeral	
<b>Temporary Impacts</b>				
Pond 1 Embankment	265	0.043	Intermittent	Skyles Creek of Birch River
Pond 2 Embankment	212	0.050	Intermittent	Un-named Tributary of Skyles Creek of Birch River
Pond 3 Embankment	237	0.060	Intermittent	Un-named Tributary of Birch River

- ☒ There are "isolated, non-navigable, intra-state waters or wetlands" within the reviewed area.  
☒ Decision supported by SWANCC/Migratory Bird Rule Information Sheet for Determination of No Jurisdiction.

#### BASIS OF JURISDICTIONAL DETERMINATION:

##### A. Waters defined under 33 CFR part 329 as "navigable waters of the United States":

- ☒ The presence of waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

##### B. Waters defined under 33 CFR part 328.3(a) as "waters of the United States":

- ☒ (1) The presence of waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.  
☒ (2) The presence of interstate waters including interstate wetlands.<sup>1</sup>  
☒ (3) The presence of other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters (check all that apply):  
☐ (i) which are or could be used by interstate or foreign travelers for recreational or other purposes.  
☐ (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.  
☐ (iii) which are or could be used for industrial purposes by industries in interstate commerce.  
☒ (4) Impoundments of waters otherwise defined as waters of the US.  
☒ (5) The presence of a tributary to a water identified in (1) – (4) above.  
☒ (6) The presence of territorial seas.  
☒ (7) The presence of wetlands adjacent<sup>2</sup> to other waters of the US, except for those wetlands adjacent to other wetlands.

**Rationale for the Basis of Jurisdictional Determination (applies to any boxes checked above).** *If the jurisdictional water or wetland is not itself a navigable water of the United States, describe connection(s) to the downstream navigable waters. If B(1) or B(3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection (i.e., discuss site conditions, including why the waterbody is navigable and/or how the destruction of the waterbody could affect interstate or foreign commerce). If B(2, 4, 5 or 6) is used as the Basis of Jurisdiction, document the rationale used to make the determination. If B(7) is used as the Basis of Jurisdiction, document the rationale used to make adjacency determination:* Skyles Creek (location of the proposed Valley Fill 1) on-site exhibits a surface water connection to Birch River. The unnamed tributary to Skyles Creek (location of the proposed Valley Fill 2) on-site exhibits a surface water connection to Skyles Creek of Birch River. The unnamed tributaries of Birch River (location of the proposed Valley Fill 3) on-site exhibit surface water connections to Birch River. Birch River flows into the Elk River, a navigable water of the U.S.

##### Lateral Extent of Jurisdiction: (Reference: 33 CFR parts 328 and 329)

- |  |  |
|--|--|
| <input checked="" type="checkbox"/> Ordinary High Water Mark indicated by:<br><input checked="" type="checkbox"/> clear, natural line impressed on the bank<br><input checked="" type="checkbox"/> the presence of litter and debris<br><input type="checkbox"/> changes in the character of soil<br><input checked="" type="checkbox"/> destruction of terrestrial vegetation<br><input type="checkbox"/> shelving<br><input type="checkbox"/> other: | <input checked="" type="checkbox"/> High Tide Line indicated by:<br><input type="checkbox"/> oil or scum line along shore objects<br><input type="checkbox"/> fine shell or debris deposits (foreshore)<br><input type="checkbox"/> physical markings/characteristics<br><input type="checkbox"/> tidal gages<br><input type="checkbox"/> other: |
|--|--|

- ☒ Mean High Water Mark indicated by:  
☐ survey to available datum; ☐ physical markings; ☐ vegetation lines/changes in vegetation types.

- ☒ Wetland boundaries, as shown on the attached wetland delineation map and/or in a delineation report prepared by:

##### Basis For Not Asserting Jurisdiction:

- ☒ The reviewed area consists entirely of uplands.  
☒ Unable to confirm the presence of waters in 33 CFR part 328(a)(1, 2, or 4-7).  
☒ Headquarters declined to approve jurisdiction on the basis of 33 CFR part 328.3(a)(3).  
☒ The Corps has made a case-specific determination that the following waters present on the site are not Waters of the United States:  
☐ Waste treatment systems, including treatment ponds or lagoons, pursuant to 33 CFR part 328.3.  
☐ Artificially irrigated areas, which would revert to upland if the irrigation ceased.  
☐ Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.  
☐ Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.  
☐ Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States found at 33 CFR 328.3(a).  
☐ Isolated, intrastate wetland with no nexus to interstate commerce.  
☐ Prior converted cropland, as determined by the Natural Resources Conservation Service. Explain rationale:  
☐ Non-tidal drainage or irrigation ditches excavated on dry land. Explain rationale:  
☐ Other (explain):

**DATA REVIEWED FOR JURISDICTIONAL DETERMINATION (mark all that apply):**

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant.
- ☒ Data sheets prepared/submitted by or on behalf of the applicant.
- ☒ This office concurs with the stream delineation report dated August 26, 2004 and supplemental information dated September 10, 2004 prepared by (company): Summit Engineering, Inc.
- ☐ This office does not concur with the delineation report, dated \_\_\_\_\_, prepared by (company): \_\_\_\_\_
- ☒ Data sheets prepared by the Corps.
- ☒ Corps' navigable waters' studies:
- ☒ U.S. Geological Survey Hydrologic Atlas:
- ☒ U.S. Geological Survey 7.5 Minute Topographic maps:
- ☒ U.S. Geological Survey 7.5 Minute Historic quadrangles:
- ☒ U.S. Geological Survey 15 Minute Historic quadrangles:
- ☒ USDA Natural Resources Conservation Service Soil Survey:
- ☒ National wetlands inventory maps:
- ☒ State/Local wetland inventory maps:
- ☒ FEMA/FIRM maps (Map Name & Date):
- ☒ 100-year Floodplain Elevation is: \_\_\_\_\_ (NGVD)
- ☒ Aerial Photographs (Name & Date):
- ☒ Other photographs (Date): August 2004
- ☒ Advanced Identification Wetland maps:
- ☒ Site visit/determination conducted on:
- ☒ Applicable/supporting case law:
- ☒ Other information (please specify):

Prepared by: Yeresa Spagna Date: 9-13-04  
 Approved by: James Judge Date: 9-13-04

<sup>1</sup>Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

<sup>2</sup>The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.